

In the matter of: :

Proposed Priorities. :

American History and Civics Education. :

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I write to provide comments in opposition to your “Proposed Priorities” of April 19, 2021. These comments are made in my personal capacity. At the highest level, I wish to express my support for the incorporation of underrepresented viewpoints in all Department of Education (ED) grants. However, I am concerned about the proposed priorities. First, the proposal itself appears to evince racial animus, and while I am thus unsure if any final agency action could be lawful, I do recommend several concrete steps to remove this facial bias that might have the purpose or effect of discouraging lawful applicants.

I am also concerned that the proposed priorities would encourage applicants to include information in their applications that, if taken into account for, or the basis for a funding decision or prioritization, would likely be unlawful discrimination under Title VI of the Civil Rights Act of 1964. For example, in asking that an applicant “describe how its proposed project incorporates teaching and learning practices” that satisfy the listed criteria on one of the proposed priorities, in the context of the total proposal, this could encourage applicants to include demographic information about instructors. To avoid this, ED could develop tools to blind application reviews to demographic makeup, by, for example, screening out applicant names, or by mandating the removal of any personally identifiable reference to faculty.

It cannot be the case that an application be prioritized over others on the basis that its faculty are of a certain race and thus “better” able to communicate certain ideas or with certain student populations. Given the citation of Ibram Kendi, for example, an individual who is specifically known and cited for making comments about “white people” as a class, applicants might be discouraged from applying for ED grants if they believe their otherwise qualifying proposal is not sufficiently negative towards that racial group, or if their educational institution has “too many” instructors of that race. At this point, the proposed priorities themselves might be beyond remedy, but explicit disavowal of Kendi or the various citations that suggest animus against a protected group is certainly necessary. As Kendi himself argues in other contexts: one is either racist or anti-racist. Merely stating that the proposals themselves do not harbor animus, or being non-responsive to this comment and others like it is precisely demonstrating that impermissible animus. It is extremely to evident on the fact of the proposal who and what “need not apply.”

If, however, ED believes it has a compelling justification to issue funding priorities that allow prioritization on the basis of instructor demographic makeup (or research or training about ensuring some racial or ethnic “fit” between instructors and instructed), or animus to a particular group, ED’s final proposal should explicitly note that and how it narrowly tailors this scheme. For example, ED might explain how one or another relevant group does substantially better or worse (presumably evincing group animus) while instructed a certain way or with certain instructors.

Finally, I wish to comment on the regulatory burden the application process imposes, and its compliance with plain language requirements. Specifically, the proposal includes a lot of highly technical language that applicants are likely unfamiliar with. Terms like “diversity,” “systemic marginalization,” “bias,” “inequity,” and “validate,” among others, are left undefined. It is not the case that every term in a proposed agency action needs to be defined, as no document is self-contained and all documents must refer back to common usage. However, these specific

terms are use in a novel and undefined way, and because these are words on which funding decisions rely, they must be more fleshed out. Given the facial animus of the proposal, these overly vague terms might take their concrete application in legally impermissible ways.

I am filing my comment right before the deadline, and I have just reviewed some other public comments. Many reflect the fear that the proposals themselves evince racial animus. I discovered this rule through my reading the Federal Register, and I am unaware of any group organizing mass comments. The sheer bulk and varied nature of these non duplicative comments does itself provide evidence that the proposals facially evince animus towards particular ethnic, racial, or other protected groups, or (inversely) favoritism.

If I were an otherwise qualifying institution seeking to apply for a grant that would comply with the text of the priorities, but which sought to teach how the white ethnic working class has been systemically repressed by the well-funded upper class elites like Kendi, or which sought to teach how Harvard discriminates against Asian Americans, I would believe, based in part on the precatory language in the proposal, that these viewpoints would not qualify, precisely due to the terminology used and its highly technical applied meaning.